

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

5

ROEHL TRANSPORT, INC.

10

and

CASE 30–CA–16743

JEFFERY L. SWANSON

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Brent E. Childerhose, Esq.,
for the General Counsel

Mr. Jeffery L. Swanson,
of Palm Springs, California,
for the Charging Party

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Richard W. Pins, Esq. And
Joel E. Abrahamson, Esq.
(Leonard, Street and Deinard, P.A.),
of Minneapolis, Minnesota,
for the Respondent

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BENCH DECISION AND CERTIFICATION

Statement of the Case

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KELTNER W. LOCKE, Administrative Law Judge: I heard this case on September 22, 2004 in Marshfield, Wisconsin. After the parties rested, I heard oral argument, and on September 24, 2004, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.¹

The 8(a)(3) Issue

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The Complaint alleges that Respondent's discharge of the Charging Party violated both Section 8(a)(1), which prohibits acts which interfere with, restrain and coerce employees in the exercise of Section 7 rights, and Section 8(a)(3) of the Act, which prohibits employment discrimination to encourage or discourage membership in a labor organization.

¹ The bench decision appears in uncorrected form at pages 352 through 386 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

The record discloses at least some union activity. Based on Charging Party Swanson’s uncontradicted testimony, I find that he did contact the Teamsters Union and, at some point, discussed unionization with other employees. However, for reasons discussed in the bench decision, I have discredited Swanson’s testimony that he asked Operations Manager Padgett “Are you talking about my talking about a union here?”

No credited evidence connects Swanson’s limited union activity with Respondent’s decision to discharge him. Rather, the record clearly establishes that Respondent decided to terminate Swanson’s employment after he failed to agree to stop “badmouthing” the company. More specifically, Respondent discharged Swanson after he persisted in asking for a clarification of the term “badmouthing” rather than promising not to do it.

Absent such a clarification, employees reasonably could conclude that “badmouthing” included discussions of wages, hours and working conditions protected by Section 7 of the Act. Employees also reasonably could conclude that a prohibition of “badmouthing” the company also would preclude certain union activities.

Finding that Respondent discharged Swanson because he would not promise to forego protected activities, I concluded that the discharge violated both Section 8(a)(1) and Section 8(a)(3) of the Act. However, it is not as clear that Respondent fired Swanson, in part, to discourage membership in a labor organization. Arguably, the evidence establishes a violation of Section 8(a)(1) but not a violation of Section 8(a)(3).

Nonetheless, because Swanson engaged in at least some union activity, and because the “badmouthing” prohibition reasonably would be understood to limit union as well as other concerted activity, I continue to recommend that the Board find a Section 8(a)(3) violation as well as a Section 8(a)(1) violation. However, finding an 8(a)(3) violation would not change the remedy. The Board may conclude that it is not necessary to reach the 8(a)(3) issue. *Phoenix Transit System*, 337 NLRB 510, fn. 3 (2002); *Dougherty Lumber Co.*, 299 NLRB 295, fn. 1 (1990).

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B. I recommend that the Board order Respondent to offer the Charging Party immediate and full reinstatement to his former position, or to a substantially equivalent position if his former position is not available, and to make the Charging Party whole, with interest, for all losses suffered because of the unlawful discrimination.

CONCLUSIONS OF LAW

1. The Respondent, Roehl Transport, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. On September 3, 2003, the Respondent violated Section 8(a)(1) of the Act by informing employee Jeffery L. Swanson that his protected, concerted activities were

incompatible with continued employment, by issuing a written warning to him, and by discharging him.

3. The Respondent violated Section 8(a)(3) of the Act by issuing a written warning to and discharging Jeffery L. Swanson on September 3, 2003.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not engage in the unfair labor practices alleged in the complaint not specifically found herein.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended²

ORDER

The Respondent, Roehl Transport, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Informing employees that their protected, concerted activities were incompatible with continued employment.

(b) Issuing warnings to employees because they engaged in union or other protected activities or because they refused to agree not to engage in such activities in the future.

(c) Discharging employees because they engaged in union or other protected activities or because they refused to agree not to engage in such activities in the future.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Jeffery L. Swanson immediate and full reinstatement to his former position, or to a substantially equivalent position if his former position is unavailable, and make

² If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

him whole, with interest, for any losses he suffered because of Respondent’s unfair labor practices.³

(b) Within 14 days after service by the Region, post at its facilities in Marshfield, Wisconsin, copies of the attached notice marked “Appendix B.”⁴ Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 3, 2003.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C.

Keltner W. Locke
Administrative Law Judge

³ Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

⁴ If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading “**POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD**” shall read “**POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.**”

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This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. For the reasons to be discussed, I find that Respondent's discharge of Jeffery L. Swanson violated Section 8(a)(1) and (3) of the National Labor Relations Act.

Procedural History

This case began on February 23, 2004, when the Charging Party, Jeffery L. Swanson, filed his initial unfair labor practice charge against the Respondent, Roehl Transport, Inc. On May 28, 2004, after an investigation of this charge, the Acting Regional Director for Region 30 of the Board issued a Complaint and Notice of Hearing. In issuing this Complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

On June 14, 2004, the Acting Regional Director filed a Corrected Complaint. Respondent filed a timely Answer and Amended Answer. For brevity, I will refer to the Respondent's Amended Answer simply as the "Answer."

On September 22, 2004, hearing opened before me in Marshfield, Wisconsin. The parties completed the presentation of evidence on that day. On September 23, 2004, counsel gave oral argument and today, September 24, 2004, I am issuing this bench decision.

Undisputed Matters

Based on admissions in Respondent's Answer and stipulations at the hearing, I make the following findings. The government has proven the timely filing and service of the charge and amended charge, as alleged in Complaint paragraphs 1(a) and 1(b).

At all material times, Respondent, a corporation with its headquarters in Marshfield, Wisconsin, has been engaged in the business of interstate transportation of various goods, as alleged in Complaint paragraph 2(a). Respondent's business satisfies the Board's discretionary standard for the exercise of jurisdiction as alleged in Complaint paragraph 2(b). At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, as alleged in Complaint paragraph 2(c).

At all material times, the following individuals have been Respondent's supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively: Fleet Manager Douglas G. Rogers, Operations Manager Thomas G. Padgett, Director of Human Resources Gregory P. Koepel, Director of Van Operations Danial L. Bennett, and Vice President of Operations Leon Palmer.

On September 3, 2003, Respondent, at its headquarters, issued a written disciplinary warning to the Charging Party, as alleged in Complaint paragraph 6(a). On September 3, 2003, Respondent, at its headquarters, terminated the employment of the Charging Party, as alleged in Complaint paragraph 6(b).

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The Disputed Allegations

5 Although Respondent has admitted that it issued a written warning to Charging Party Swanson and then discharged him on September 3, 2003, it denies that it took these actions because Swanson engaged in protected concerted activity, because Swanson joined, supported or assisted a union, or to discourage employees from engaging in these activities, as alleged in Complaint paragraphs 7 and 8. Respondent likewise denies that it violated Section 8(a)(1) and
10 (3) of the Act, as alleged in Complaint paragraphs 9 and 10, respectively.

 The Complaint also alleges that certain supervisors made a statement to Swanson which interfered with, restrained and coerced employees in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act. More specifically, Complaint paragraph 5 alleges that on
15 September 3, 2003, Respondent, by Thomas Padgett and Douglas Rogers, informed the Charging Party that his protected concerted activities were incompatible with continued employment. Respondent denies this allegation, as well as the conclusion, alleged in Complaint paragraph 9, that such conduct violated Section 8(a)(1).

The Government's Theories of Violation

20 In part, the General Counsel alleges that Respondent violated Section 8(a)(1) and (3) of the Act by issuing a written warning to Swanson and then discharging him on September 3, 2003. To support these conclusions, the government advances three legal theories.

25 First, the government asserts that the Board should apply the doctrine announced by the Supreme Court in *Labor Board v. Burnup & Sims*, 379 U.S. 21 (1964). Under this theory, the government can establish a violation of Section 8(a)(1) by proving that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis
30 of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct. See, e.g., *Accurate Wire Harness*, 335 NLRB 1096 (2001).

35 Second, the General Counsel also urges that the Board evaluate the discharge under the standards set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under this framework, the government initially bears the burden of proving that the employee who was discharged had engaged in activity protected by the Act, that the employer was aware of this protected activity, that the employer took an adverse employment action against the employee, and that there is a link or nexus between the protected
40 activity and the adverse employment action.

 If the government proves these four elements, the employer then bears the burden of establishing that it would have taken the same action against the employee in any case, even in
45 the absence of protected activity.

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Third, the General Counsel contends that Respondent discharged Swanson because he would not agree to forego engaging in protected activity in the future. This theory may be viewed in two ways.

Conditioning employment on an employee's promise to abandon protected activity might be tantamount to insistence upon a so-called "yellow dog contract." See, e.g., *Pratt Towers, Inc.*, 338 NLRB 61 (2002), in which the Board found that an employer unlawfully refused to reinstate strikers unless they agreed to renounce union activity.

Additionally, an employee's refusal to forswear future protected activity itself would constitute protected activity. Discharging an employee for refusing to waive his Section 7 rights therefore would constitute interference with those rights under Section 8(a)(1).

The Facts

Respondent employed Charging Party Swanson as an over-the-road truck driver. Swanson worked out of his home in Grand Rapids, Michigan, but his work took him to all of the 48 contiguous states.

Swanson testified that he had contacted the Teamsters Union and had talked with other drivers about seeking union representation. Because he worked by himself much of the time as a long-haul trucker, Swanson had limited opportunities to discuss unionizing with other drivers. He estimated that he raised the subject with a driver about once a week. However, Swanson did not testify that he solicited employees to sign authorization cards and I conclude that he did not.

For reasons I will discuss later, I have some doubts about the accuracy of Swanson's testimony. No other witness corroborated his assertion that he talked about unionization with other drivers. Based upon my observations of the witnesses, I cannot rule out the possibility that Swanson exaggerated when describing his union activities.

Swanson testified that he voiced the complaints of other employees to members of management on Tuesday, August 26, 2003, when he was attending a cookout at Respondent's terminal in Gary, Indiana. Respondent sponsored this event as part of its annual celebration of Driver Appreciation Week. Other trucking companies throw similar parties to honor their drivers during this same week. The event at Respondent's Gary terminal actually appears to have been more elaborate than the term "cookout" would imply. Respondent hired a bluegrass band to provide music, and also handed out gifts to the drivers.

Swanson testified that during this event, he talked with a group of about 15 drivers concerning their work-related complaints. According to Swanson, the drivers expressed particular concerns about a new procedure Respondent was implementing. Under this procedure, drivers were to purchase fuel at certain designated truck stops equipped with scanning equipment. While at such a truck stop, the driver would scan his paperwork and transmit it to Respondent. Swanson asserted that the new procedure took too much time and put the drivers behind schedule.

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While Swanson was talking with the drivers, Operations Manager Thomas Padgett and the new director of van operations, Danial Bennett, walked over. Padgett introduced Bennett to the drivers.

There was nothing unusual about the managers joining the group at this time. One purpose of Driver Appreciation Week was to provide an opportunity for managers to socialize with drivers and discuss their work, including work-related problems.

Swanson testified that Bennett told the group that he had heard they had some concerns and that he, Bennett, would like to know what was on their minds. According to Swanson, the drivers responded by describing problems associated with the new scanning procedure, and Swanson told Bennett that the drivers should be reimbursed for the time they spent scanning the paperwork rather than driving.

In Swanson’s version, Bennett “appeared to become defensive” after one of the drivers complained about pay. Swanson testified that Bennett responded by saying that the company made very little net profit. Swanson then spoke up, saying “Dan, I believe that what my fellow driver is talking about is that over the last year you folks have bought about 300 new tractors” and over 500 new trailers. According to Swanson, he also mentioned that Respondent had remodeled two terminals and installed an expensive telephone system, but the drivers had not had a pay increase in five years.

Swanson testified that the drivers also raised safety concerns and problems with dispatchers. He admitted that while talking to Bennett, he referred to the dispatchers as “dick scratchers.”

Swanson’s description of this discussion differs from the accounts of other witnesses. In Swanson’s version, all of the 15 drivers participated in this conversation and Swanson spoke only about 25 percent of the time.

Swanson asserted that Bennett “made it very clear by his body language” that he “didn’t like being challenged on these issues.” Swanson described Bennett as “talking down” to the drivers. Swanson depicted himself as a spokesman for the other drivers’ concerns: “What I was doing was trying to forward the drivers’ thoughts and sentiments and concerns.”

For several reasons, to the extent that Swanson’s testimony conflicts with that of other witnesses, I do not credit it. At points, Swanson’s testimony sounded somewhat self-serving and calculated. For example, I have some difficulty believing that Swanson really began a sentence in this fashion: “Dan, I believe that what my fellow driver is talking about. . .”

The phrase “my fellow driver” does suggest that Swanson intended to speak on behalf of other employees, but is this really the way truck drivers would talk at a barbecue? The phrase sounds a little bit stilted, and I have some difficulty imagining that the same person who spoke with such formality also called the dispatchers “dick scratchers.”

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Additionally, after observing Bennett while he testified, it is a stretch to believe that the drivers' complaints could put him "on the defensive," as Swanson indicated. Similarly, based on Bennett's demeanor as a witness, I find it improbable that he would speak to the drivers in a patronizing or condescending way. Indeed, before becoming a member of management, Bennett
 5 had worked as a truck driver for eight years, and I believe he had considerable respect both for the drivers and their difficult work.

Moreover, the testimony of witnesses other than Swanson painted a consistent picture of this discussion which was quite different from Swanson's account. These other witnesses do not
 10 describe a discussion in which all the drivers participated. Rather, this testimony indicates that, for the most part, Swanson talked and the other drivers did not. This inconsistently increases my doubts about the reliability of Swanson's testimony.

Swanson said he used the term "dick scratchers" in a "somewhat humorous way" but if
 15 so, his lighthearted mood was not apparent to other witnesses. Another truck driver, Bradley King, described the conversation as heated and one-sided, noting that it seemed Swanson didn't like working there. King further testified that when Swanson used the term "dick scratcher," no one laughed.

20 When Swanson testified, I did not form the impression that he tended towards the jovial. Rather, he seemed to be intense.

One other factor concerned me. Swanson was on the witness stand at the time I recessed the hearing for lunch. I instructed him not to discuss his testimony with anyone. When the
 25 hearing resumed, counsel for the General Counsel informed me that Swanson wanted to change one part of his testimony. Of course, under the stress of testifying, many witnesses make inadvertent errors which they later correct. However, when I consider Swanson's desire to change part of his testimony together with the other factors, I do not have great confidence in its reliability. Therefore, to the extent Swanson's testimony conflicts with other witnesses, I do not
 30 credit it.

Swanson did not change the part of his testimony which concerned this discussion during the cookout. The change pertained to events which took place the next week while Swanson was
 35 on the road. For clarity, it may be helpful to begin with some background information.

Swanson did not drive a fixed route but received assignments from his supervisor, Fleet Manager Douglas Rogers. Fleet managers, sometimes called dispatchers, communicate with the truck drivers either by telephone or by a system called DriverLink which uses Earth satellites to
 40 transmit email-type messages to and from each truck.

Under Respondent's "home time" policy, Swanson was entitled to three days off if his work had taken him away from home for 10 days. When a fleet manager knows that a driver was going to be away from home for 10 days, the manager tries to find a load assignment with a destination close to the driver's home.
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Respondent's "Driver Reference Guide" informs employees that their "home time will be measured in hours rather than calendar days." Therefore, "three days off" means 72 hours off, and at the end of that time, the driver must be available to work. However, Fleet Managers, including Rogers, have authority to extend the "home time" by up to 24 hours.

According to Swanson, he had requested to take three days off so that he could visit his son, who was attending graduate school in Louisville, Kentucky. Swanson wanted to be in Louisville on a weekday, so that he could help his son make financial arrangements.

Initially, Swanson testified that he had requested "home time" for Friday, Saturday and Sunday, August 29 through 31, 2003. After the lunch break, Swanson testified that he had requested to take off Thursday, Friday and Saturday, August 28 through 30, 2003. Monday, September 1, was Labor Day, and Swanson had been concerned that financial institutions would be closed.

According to Swanson, he learned that he had been assigned to pick up a load for delivery to a town in Indiana on Friday. Swanson's testimony indicates that he received this information via the terminal in his truck on Wednesday, August 27. There is no doubt that he didn't like the news.

Swanson had wanted to be in Louisville on Friday to transact the financial business with his son. He drove back to the Gary, Indiana terminal and met with Danial Bennett. As director of van operations, Bennett outranked the fleet manager, Rogers, who had assigned Swanson the Friday delivery.

Swanson described Bennett as being "accommodating." From the record, it is clear that Bennett expended considerable effort to find an assignment for Swanson that he could deliver in the Louisville area before Friday. Even if Swanson's comments at the cookout had irritated Bennett, no trace of irritation was apparent as Bennett tried to solve the scheduling problem.

Swanson testified that Bennett did find him a more favorable assignment, but it still required a Friday delivery. According to Swanson, he told Bennett that he would like to take Monday off just to make sure he could get things done. In Swanson's version, Bennett called the company headquarters and left a message instructing Rogers to change Swanson's load assignment "and that I was not going to be back to work till Tuesday morning, that I was going to take Monday off and that he and I had discussed that."

Bennett testified that he did not recall having the meeting which Swanson described. However, he did not deny it, even when given the opportunity several times:

Q You didn't see him [Swanson] on August 27?

A I'm being told I was, but I do not recall that.

Q When you say you're being told you were, what do you mean by that?

A Well, it's my understanding that Jeff [Swanson] and I had a conversation on Wednesday, but I do not recall that conversation.

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Q . . .Mr. Bennett, do you remember ever switching loads for Mr. Swanson?

A No, I do not.

5 Q Is it possible that you did?

A Yes, very possible.

10 Bennett did not recall giving Swanson Monday, September 1st off, but he did not believe it likely. Ordinarily, operations managers and fleet managers, who are below Bennett in the chain of command, make such decisions. Bennett testified that it was his habit not to get involved in such decision-making unless a major problem occurred.

15 Based upon my observations of the witnesses, I conclude that Bennett testified reliably to the best of his recollection. On the other hand, for reasons already discussed, I do not credit Swanson's testimony to the extent it conflicts with that of other witnesses. However, in this instance, it does not conflict with Bennett's, who simply had no recollection.

20 Computer records show that Swanson did receive a new assignment on August 27, but do not indicate whether Bennett had any role in making that assignment. However, Bennett testified that it was "very possible" that he switched loads for Swanson. Moreover, Fleet Manager Rogers testified that on August 27, Bennett instructed him to switch the loads assigned to Swanson and another driver. Therefore, I conclude that Bennett did give instructions to reassign the load Swanson was hauling and to give him another assignment more consistent with Swanson's need to be in Louisville.

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However, I do not find that Bennett told Swanson that he could have the day off on Monday, September 1. If Bennett had authorized granting this time off, his instruction would have gone down the chain of command through Fleet Manager Rogers in the same way as the instruction to have Swanson switch loads. However, Rogers testified that he did not give Swanson Monday off.

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Rogers' testimony, along with the computer records, show that Swanson arrived in Louisville on Thursday, August 28, rather than Friday, August 29. According to the computer, Swanson delivered the load to its destination in Versailles, Kentucky, slightly after 7 a.m. At that point, he was free to continue on to Louisville, about 60 to 70 miles away. Computer records indicate that he left Versailles, Kentucky for Louisville about 7:34 a.m.

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Swanson's "home time" therefore began on Thursday, not Friday. Under the policy published in the Roehl Driver Reference Guide, the "home time" would end 72 hours after it started.

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In this instance, however, Fleet Manager Rogers exercised his authority to grant Swanson an additional 24 hours off. Therefore, Swanson's "home time" ended 96 hours after it began on Thursday morning. In other words, the "home time" ended, and Swanson had to be available for work, on Monday morning.

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Based upon my observations of the witnesses, I conclude that Rogers' testimony is reliable. Crediting it, I find that neither Bennett nor Rogers gave Swanson permission to take
5 Monday off.

There may be some confusion as to when Swanson learned that he would have to work on Monday. He testified that he had dropped off the load and was driving to Louisville when he received a DriverLink message to call Fleet Manager Rogers on Friday about picking up a load
10 on Monday. However, Swanson testified, "the thing was, it was Friday."

That testimony is not consistent with the credited evidence that Swanson arrived in Louisville on Thursday and was off work on Friday. Based on Rogers' credible testimony, I find that Rogers sent the message to him on Thursday morning, not on Friday as Swanson testified.
15 After Swanson received the message, he discussed it with Rogers by telephone.

Swanson protested having to work on Monday. According to Swanson, Rogers told him "It's apparent you're not coming back until Tuesday anyway, so call me on Tuesday." To the extent such testimony conflicts with that of Rogers, I credit Rogers.
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Based on that testimony, I find that Rogers told Swanson that taking Monday off was not acceptable. In view of Swanson's unwillingness to work Monday, Rogers would not schedule a load for him on Monday, but, he told Swanson, they would talk about it on Tuesday.

Rogers did not assign Swanson to work on Monday because he did not expect Swanson to make himself available for work. If Swanson did not show up for an assignment, it could mean that a customer would not receive a delivery, and Rogers did not want to take that risk. However, Rogers' decision not to assign Swanson to work on Monday did not signify that Rogers condoned Swanson's refusal. To the contrary, Rogers intended to take disciplinary
25 action.
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After that conversation, Swanson called again and left Rogers a voice mail message. Crediting Rogers, I find that Swanson confirmed in that message that he was unwilling to work on Monday, and that he also said that any reprimand would be "unacceptable." Further,
35 Swanson said that if Rogers decided to reprimand him, that the company would have to route him through Marshfield, Wisconsin, where Rogers worked, so that he and Rogers could have words.

Rogers had authority to issue Swanson a warning but did not have authority to discharge him. Rogers recommended to higher management and the human resources department that Swanson's employment be terminated and drafted a discharge letter. However, Human Resources Director Koepel believed that a written warning would be sufficient.
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Swanson came to the company headquarters in Marshfield, Wisconsin on September 3, 2003, and met with Fleet Manager Rogers and his superior, Operations Manager Padgett. Padgett no longer works for Respondent and has no interest in the outcome of this case likely to
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influence his testimony. Moreover, based upon my observations, I conclude that his testimony is reliable and credit it.

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However, Padgett could not recall some of the details of this meeting. To the extent that Swanson’s testimony does not contradict that of Padgett or Rogers, I will rely upon it to supply some of those details.

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At the meeting, the managers gave Swanson a warning memo which the human resources director had drafted. It summarized the conduct considered unacceptable in five indented paragraphs marked by “bullet” symbols. The first two paragraphs referred to Swanson’s refusal to work on Monday, September 1.

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The third paragraph alluded to Swanson’s use of the term “dick scratcher” at the cookout. The fourth paragraph referred to an earlier matter for which Swanson received no discipline other than an oral warning. The fifth paragraph stated as follows:

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Finally and perhaps the most fundamental issue is your continual “badmouthing” of Roehl Transport. Your incessant negative ranting about the company to other employees has been very disruptive – a disruption I will not tolerate any longer. If you find it so difficult to work here you should simply leave.

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The warning continued by stating that continuing the cited behavior “will result in your losing your job here,” and listing four things Swanson needed to do “to maintain your employment with us.” These included following the work directions provided by the fleet manager and the following: “Stop badmouthing the company!”

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Swanson asked for Padgett to explain what the memo meant by “badmouthing.” According to Swanson, he asked if he was being accused of saying negative things about the company to customers, and Padgett said no. Padgett’s testimony corroborates Swanson on this point. “I had no issues there,” Padgett testified. Crediting both Padgett and Swanson on this point, I find that Padgett informed Swanson that he was not being accused of saying negative things about Respondent to its customers.

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Swanson also testified that he asked Padgett “‘Are you talking about my talking about a union here?’ And his words were exactly, ‘No, I don’t care about that.’” However, Padgett testified that there was no reference to unions at this meeting. Crediting Padgett, I find that Swanson did not pose the question, “Are you talking about my talking about a union here” and that Padgett did not provide the answer which Swanson attributed to him.

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Swanson testified that he told Padgett that he believed he had a legal right to talk about the company. Padgett did not recall such a statement, but did not specifically deny it. Such a statement would appear very much in character for Swanson and so, absent a specific denial by Padgett, I find that Swanson did say that he believed he had a right to talk about the company.

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Further, I find that Swanson did ask Padgett to explain the meaning of “badmouthing.” Swanson was not satisfied with Padgett’s answer and requested to speak with Human Resources Director Koepel.

Padgett went to Koepel, but did not take Swanson with him. While Padgett was speaking with Koepel, the vice president of operations, Leon Palmer, walked in. Palmer and Koepel declined to see Swanson unless he first agreed to abide by the instructions in the written warning. The record is not entirely clear on how they reached a decision or who proposed it, but in essence, Koepel and Palmer told Padgett that Swanson had to abide by the terms of the warning letter, and if he did not, he would be discharged.

Padgett returned to Rogers and Swanson. Padgett asked Swanson “are you prepared to sign off on the written warning and abide by the conditions of it” and Swanson said he wasn’t prepared to say one way or the other. From Swanson’s testimony, which Padgett and Rogers do not contradict, Swanson again requested an explanation of the meaning of the word “badmouthing.”

Padgett again asked Swanson if he were willing to abide by the warning. “I didn’t get a yes,” Padgett testified, so he told Swanson that his employment was terminated. Padgett’s choice of words is significant. The record does not establish that Swanson ever said, outright, that he would not abide by the terms of the warning. Padgett did not bend the truth by claiming that Swanson said “No,” only that he failed to say “yes.”

Rather, Swanson would not give his assent until he received a clarification of the term “badmouthing.” Although he didn’t describe his reasoning in quite these terms, Swanson’s testimony makes clear that he believed the law protected at least some speech by employees about their employer; he wanted to know the contours of Respondent’s rule so he could determine whether it would prohibit him from exercising his statutory rights.

Legal Analysis

As already noted, Respondent has admitted that it discharged Swanson on September 3, 2003, but denies that it acted unlawfully. The General Counsel advances three theories to support finding an unfair labor practice.

The Burnup & Sims Theory

In *Labor Board v. Burnup & Sims*, 379 U.S. 21 (1964), the Supreme Court held that the government could prove that a discharge violated Section 8(a)(1) of the Act by showing that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

In *Pepsi-Cola Company*, 330 NLRB 474 (2000), the Board held that an analysis under *Burnup & Sims* must state clearly (a) whether the Respondent established that it held an honest

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belief that the discharged employee had engaged in the misconduct attributed to him; and (b) if the Respondent did establish that it held such a belief, whether the General Counsel carried his burden of showing that the person did not engage in the misconduct.

As I understand the General Counsel's argument in the present case, the government asserts that Swanson was engaged in protected concerted activity at the August 26, 2003 cookout when he voiced the job-related concerns of other drivers to a management official. To support this argument, the General Counsel cites *Cibao Meat Products*, 338 NLRB 934 (2003).

However, Swanson was not engaged in this activity at the time Respondent discharged him. Moreover, Respondent contends that it had legitimate business reasons for terminating Swanson's employment and has introduced records showing previous disciplinary actions it took under assertedly similar circumstances.

Thus, Respondent defends by presenting evidence that lawful rather than unlawful motives prompted the decision to fire Swanson. However, a *Burnup & Sims* analysis does not require extrinsic proof of unlawful motive. This theory therefore departs from the familiar *Wright Line* framework which requires the General Counsel to prove unlawful motivation by showing a connection between the protected activity and the adverse employment action.

Accordingly, the *Burnup & Sims* theory applies only to a limited range of situations in which motivation cannot seriously be disputed. More specifically, *Burnup & Sims* applies when an employee is engaged in a protected activity and is discharged for alleged misconduct committed during that activity.

Rather than focusing on whether antiunion animus has tainted an employer's motivation, the *Burnup & Sims* framework asks whether the employer held a good-faith belief that the discharged employee had engaged in misconduct. Such a good faith belief establishes a defense but this defense is not absolute. The government can overcome the defense by showing that the employer's good faith belief was mistaken and that the asserted misconduct did not actually occur. *Accurate Wire Harness*, 1096 (2001)

To make a *Burnup & Sims* analysis appropriate, the facts must suggest that Respondent discharged Swanson because it believed Swanson had committed some act of misconduct and that this putative misconduct occurred while Swanson was engaged in protected activities. During oral argument, the General Counsel identified two instances in which Swanson engaged in arguably protected activities in the presence of Respondent's supervisors.

First, Swanson spoke out about working conditions during the August 26 cookout at Respondent's facility in Gary, Indiana. Viewing the evidence in the light most favorable to the General Counsel, I would conclude that Swanson did express the employees' shared, work-related concerns to members of management and that his language was not always the choice of diplomats.

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The General Counsel contends that during this protected activity, Swanson referred to his supervisor using a vulgar and uncomplimentary phrase, “dick scratcher,” an apparent play on the word “dispatcher.” The government assumes this to be misconduct, but argues that it is not so egregious as to lose the protection of the Act.

However, the record makes clear that Respondent did not discharge Swanson for using this unseemly epithet. Therefore, I would hesitate to apply the *Burnup & Sims* principle in this situation.

The General Counsel also points to Swanson’s protected activity on September 3, 2003, in the meeting at which he was discharged. Respondent’s management insisted that Swanson agree to abide by the requirements in the written warning as a condition of continued employment. When Swanson sought further clarification rather than offering immediate agreement, Respondent discharged him.

For reasons which will be discussed later in this decision, I conclude that Swanson’s raising questions about the “no badmouthing” rule rather than agreeing to it immediately constituted activity protected by the Act. However, the record does not suggest that Swanson committed any act of misconduct while engaged in this protected activity. Therefore, I conclude that it would be inappropriate to apply the *Burnup & Sims* doctrine in this case.

Swanson’s Protected Activity

At the August 26, 2003 cookout, Swanson clearly expressed to management the concerns of fellow employees. The record makes clear that on this occasion, Swanson criticized certain working conditions, such as the new scanning requirement, and voiced the need for a pay raise which would benefit not only himself but other employees. Although I suspect that Swanson’s testimony may have exaggerated to some extent, it cannot be disputed that Swanson expressed these concerns enough to attract the attention of management. Indeed, the September 3, 2003 written warning explicitly cites Swanson’s “negative ranting about the company *to other employees*” (italics added) and warns that it caused a disruption which would no longer be tolerated.

Respondent’s own words make clear that Swanson was talking with other employees about working conditions, which is classic protected, concerted activity. “It is well settled that an employee engages in protected activity by speaking up to management about the allegedly unfair treatment employees have received.” *Winston Salem Journal*, 341 NLRB No. 18 (January 30, 2004), citing *Churchill’s Restaurant*, 276 NLRB 775, 777 fn. 11 (1985).

Arguably, Swanson’s derogatory reference to a supervisor as a “dick scratcher” might forfeit the protection of the Act which Swanson’s activity otherwise would enjoy. However, I conclude that this comment does not rise to that level of offensiveness. To reach that conclusion, I consider the four factors which the Board enumerated in *Atlantic Steel Co.*, 245 NLRB 814 (1979).

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The first factor concerns the place of the discussion, in this case, outdoors at Respondent's facility during a cookout to honor the drivers. Based on the testimony of Respondent's managers, I find that Respondent threw this party, among other reasons, to improve communications between managers and employees and that managers attended with the expectation that there would be discussions about working conditions. Therefore, the first factor militates towards a conclusion that Swanson's speech did not lose the protection of the Act.

The second factor concerns the subject matter of the discussion. Swanson raised a number of concerns, including the new scanning procedure and its effects on the drivers and the need for a pay increase. Clearly, these subjects concern wages, hours and working conditions. Therefore, the second factor also weighs in favor of a conclusion that Swanson's speech remained protected.

The third factor concerns the nature of the outburst. In this instance, there was no outburst, but just the repeated use of a somewhat vulgar phrase. Whether or not Swanson intended his use of the phrase to be funny, it did not constitute the kind of egregious threat or insult which forfeit's the protection of the Act.

On another occasion, Swanson reportedly called one manager a "liar" and later said he would do it again. This conduct comes closer to being egregious.

The fourth criterion depends on whether Respondent's unfair labor practices provoked the "outburst." The answer is no.

In sum, the first two factors weigh rather strongly in favor of finding the conduct protected and the third factor pulls slightly in the opposite direction. Considering all four factors, I conclude that Swanson's words did not lose the Act's protection.

Swanson also engaged in protected activity when he refused to agree to forego "badmouthing" of Roehl Transport. This conclusion rests on two principles.

First, an employer lawfully may not condition employment, or continued employment, on an employee's willingness to give up protected rights. In *Pratt Towers, Inc.*, 338 NLRB 61 (2002), the Board found that an employer had violated Section 8(a)(1) and (3) by requiring strikers to abandon their union as a condition of reinstatement.

Just as an employer lawfully cannot require someone to forsake union activity as a condition of employment, an employer lawfully cannot insist that an employee renounce the right to engage in other protected activity. To the extent that Respondent discharged Swanson because he would not agree to give up protected activity, Respondent interfered with the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

Second, an employer violates the Act when it promulgates an ambiguous rule which reasonably would chill the exercise of protected rights. If the rule's wording reasonably would

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cause employees to fear discipline if they engaged in protected activity, then it violates Section 8(a)(1).

For example, in *Flamingo Hilton–Laughlin*, 330 NLRB 287 (1999), the employer promulgated a rule stating that employees “will not reveal confidential information regarding our customers, fellow employees, or Hotel Employees.” The Board held that this rule interfered with the exercise of protected rights “because it could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment, including wages, which they might reasonably perceive to be within the scope of the broadly-stated category of ‘confidential information’ about employees.”

In the present case, Respondent sought to impose on an employee, under penalty of discharge, a rule prohibiting him from “negative ranting about the company to other employees.” The rule neither defines “ranting” nor limits its meaning to conduct outside the protection of the Act.

Not having any definition of “ranting” (or “badmouthing”), and knowing that the penalty for breaking the rule was discharge, employees reasonably would choose to “err on the safe side” and refrain from activity that enjoyed the protection of the law. Applying an objective standard, I conclude that this rule reasonably would chill employees’ exercise of Section 7 rights and that, accordingly, it is unlawful.

Requiring an employee to agree to an unlawful rule as a condition of employment is itself unlawful. Additionally, an employee’s refusal to agree to abide by a rule which violates the Act constitutes protected activity.

The Independent 8(a)(1) Allegation

Complaint paragraph 5 alleges that on September 3, 2003, Respondent, by Thomas Padgett and Douglas Rogers, informed the Charging Party that his protected concerted activities were incompatible with continued employment.

For the reasons already discussed, I have concluded that requiring Swanson to cease making negative comments about Respondent to other employees violates Section 8(a)(1) of the Act. The same written warning which imposes this condition then states “this type of behavior is unacceptable and will not be tolerated any further. Continuing this behavior will result in you losing your job here.”

Presumably, the word “behavior” referred to all the conduct listed in the written warning as unacceptable. Much of this conduct, such as failing to be available for work as scheduled, clearly is unprotected. But the warning makes no exception for conduct that *is* protected, notably, discussing wages, hours and working conditions with other employees. Therefore, I conclude that this warning violates Section 8(a)(1).

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Wright Line Analysis

Although the General Counsel advocated that this case be analyzed under the *Burnup & Sims* framework, he also stated that a *Wright Line* analysis would be appropriate for the 8(a)(3) allegation. Therefore, I will examine the facts using the framework set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

For reasons already discussed, I conclude that the record clearly establishes that the Charging Party engaged in protected activity. Moreover, I find that Respondent knew about this activity, as the September 3, 2003 written warning demonstrates.

Discharge is certainly an adverse employment action. Moreover, Operations Manager Padgett testified that he discharged Swanson after Padgett had asked him twice to agree to abide by the memo and Swanson failed to do so. This testimony and the memo together establish the fourth requirement, a link between the protected activity and the adverse employment action.

Indeed, the wording of the memo indicates that management was more concerned about Swanson's protected activity – his negative comments about Respondent to other employees – than it was about its legitimate business concerns, such as Swanson's refusal to be available for work as scheduled. Thus, the memo informed Swanson that "perhaps the most fundamental issue is your continuing 'badmouthing' of Roehl Transport."

Because the government has established all four *Wright Line* elements, the burden shifts to Respondent to demonstrate that it would have taken the same action against Swanson even in the absence of his protected activity. To meet that burden, Respondent has introduced into evidence numerous records concerning discipline it imposed on other employees in ostensibly similar circumstances.

Respondent's documentation certainly weighs in favor of a conclusion that Respondent would have discharged Swanson even in the absence of protected activity. However, this case presents unusual circumstances which lead me to conclude that Respondent's evidence has not carried its burden of proof.

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Recall that when Swanson refused to be available for work on Monday, September 1, his supervisor considered Swanson’s conduct to be insubordination warranting discharge. The supervisor, Fleet Manager Rogers, not only recommended the discharge of Swanson, but also expended the effort to draft a discharge letter. Rogers clearly believed that Swanson should be fired.

However, Rogers did not have authority to discharge but only the power to recommend this action. When the recommendation reached Director of Human Resources Koepel, he decided that discharge was too severe a penalty and downgraded the discipline to a written warning.

There the matter stood until Padgett asked Swanson to agree to the terms of the warning and Swanson, rather than agreeing, insisted upon further information concerning those terms. If Swanson had agreed to those terms – thereby forsaking some of his Section 7 rights – Respondent clearly would have continued his employment.

The unusual facts of this case present the “but for” question with stark clarity. But for Swanson’s failure to agree to all the conditions – including the unlawful one – Respondent would have allowed him to keep his job. Indeed, the Respondent’s top human resources official had considered discharge too severe a penalty – until Swanson sought to guard his Section 7 rights.

Therefore, I conclude that Respondent has failed to carry its rebuttal burden. Accordingly, I recommend that the Board find that Respondent’s discharge of Swanson violated Section 8(a)(1) and (3) of the Act.

Respondent’s Oral Motion

At the beginning of the hearing, Respondent requested that, if the evidence established that Swanson’s discharge violated the Act, we proceed immediately to a hearing on the issue of damages, in particular, the extent to which the Charging Party had satisfied the duty to mitigate backpay by seeking other work. I took the motion under advisement.

After a review of the Board’s Rules and Regulations, I conclude that they do not authorize me to grant Respondent’s motion which, in essence, seeks a compliance hearing. Section 102.52 of those Rules states, in part:

After entry of a Board order directing remedial action, or the entry of a court judgment enforcing such order, the Regional Director shall seek compliance from all persons having obligations thereunder. The Regional Director shall make a compliance determination as appropriate and shall notify the parties of the compliance determination. . .

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Additionally, Section 102.54(a) of the Board’s Rules states:

5 If it appears that controversy exists with respect to compliance with an order of the Board
which cannot be resolved without a formal proceeding, the Regional Director may issue
and serve on all parties a compliance specification in the name of the Board. The
specification shall contain or be accompanied by a notice of hearing before an
10 administrative law judge at a place therein fixed and at a time not less than 21 days after
the service of the specification.

 These provisions clearly vest authority to issue a compliance specification and to
schedule a compliance hearing in the regional director, not the administrative law judge.
Moreover, the purpose of a compliance hearing is to determine how a respondent must comply
15 with a Board order. At this juncture, the Board has neither found liability nor ordered a remedy.
Therefore, I deny the Respondent’s motion.

 When the transcript of this proceeding has been prepared, I will issue a Certification
which attaches as an appendix the portion of the transcript reporting this bench decision. This
20 Certification also will include provisions relating to the Findings of Fact, Conclusions of Law,
Remedy, Order and Notice. When that Certification is served upon the parties, the time period
for filing an appeal will begin to run.

 Throughout the hearing, all parties and their representatives have acted with a high
25 degree of professionalism and civility, which I truly appreciate. The hearing is closed.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and abide by this notice.

10

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

15 Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

20

WE WILL NOT inform employees that any of their activities protected by the Act are incompatible with continued employment.

WE WILL NOT issue a warning to any employee because that employee engaged in union or other protected activities or because the employee refused to agree not to engage in such activities in the future.

25

WE WILL NOT discharge any employee because that employee engaged in union or other protected activities or because the employee refused to agree not to engage in such activities in the future.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to employee Jeffery L. Swanson and **WE WILL** make him whole, with interest, for any losses he suffered because we unlawfully disciplined and discharged him.

35

ROEHL TRANSPORT, INC.
(Employer)

Dated: _____ By: _____ (Representative) (Title)

40

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

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310 West Wisconsin Avenue, Suite 700, Milwaukee, WI 53203-2211
(414) 297-3861, Hours: 9:00 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

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THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (414) 297-3819.